CASE NO. 88-171

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

PETER W. HERZOG and JOAN L. HERZOG,
Appellants,

vs.

SAM J. COLDING, as Collier County
Property Appraiser, and the
DEPARTMENT OF REVENUE
OF THE STATE OF FLORIDA,
Appellees.

On Appeal From
The District Court Of Appeal Of
Florida, Second District

APPELLEES' MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

I.

WHETHER THIS APPEAL IS TIMELY WHERE THE OPINION OF THE SECOND DISTRICT COURT OF APPEAL OF FLORIDA WAS THAT OF THE HIGHEST COURT IN FLORIDA FROM WHICH A DECISION COULD BE HAD, AND THE NOTICE OF APPEAL WAS FILED MORE THAN 90 DAYS AFTER THE OPINION WAS ENTERED?

II.

WHETHER THE DENIAL UNDER FLORIDA LAW OF HOMESTEAD EXEMPTION TAX RELIEF TO REAL PROPERTY USED ONLY AS A TEMPORARY RESIDENCE PRESENTS A SUBSTANTIAL FEDERAL QUESTION?

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APPELLEES' MOTION TO DISMISS OR AFFIRM

The Appellees, pursuant to Supreme Court Rule 16, respectfully move to dismiss this appeal or, in the alternative, to affirm the opinion of the District Court of Appeal of Florida, Second District, on the grounds that (1) the appeal is not within the jurisdiction of this Court because the Notice of Appeal was untimely; and/or (2) the appeal does not present a substantial federal question.

STATUTORY AND RULE PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions set out in the Appellants' Jurisdictional Statement, the following statutory and rule provisions are relevant here:

28 U.S.C. §2101(c)
Rule 35(c), Fed.R.App.P.
Supreme Court Rule 11.3
Rule 9.020(g), Fla.R.App.P.
Rule 9.125(c), Fla.R.App.P.
Rule 9.330(a), Fla.R.App.P.
Rule 9.331(c), Fla.R.App.P.
Rule 12D-7.007(5), Fla.Adm.Code
51 Fla.Jur.2d, Taxation, s.20:133

Pertinent portions of these authorities are set forth verbatim in the Appendix (A 1-7).

STATEMENT OF THE CASE

The Appellees are unable to accept the Appellants' Statement of the Case because it is incomplete. The material facts presented here are undisputed and it is only the application of the law to these undisputed facts that is at issue in this

case. The Appellants are permanent residents of the State of Missouri and they also own a dwelling in Collier County, Florida, which they used as a temporary residence during portions of the year 1985 (Jur. Stat. 6, A-7). The Appellants' temporary residence in Collier County was not granted Homestead Exemption ad valorem tax relief for the year 1985 under the applicable Florida law.

The Appellants contested the 1985 tax assessment on the subject property by filing a complaint in the trial court against the Collier County Property Appraiser and the Department of Revenue, State of Florida alleging that the "permanent residence" requirement under Florida law for homestead exemption tax relief was unconstitutional as applied to nonresidents of Florida (Jur. Stat. 6-7). The constitutional claims raised by the Appellants were that the challenged provisions of the Florida homestead exemption tax law allegedly violated both the Privileges and Immunities and the Equal Protection Clauses of the United States and Florida Constitutions (Jur. Stat. A 7).

On March 19, 1987, the trial court entered a "Summary Final Judgment", based solely on the pleadings of record and argument of counsel, rejecting the constitutional claims raised by the Appellants and upholding the 1985 tax assessment by the Property Appraiser on the Appellants' temporary residence in Collier County, Florida (Jur. Stat. A 6-7). The Appellants then filed a timely appeal of the trial court's adverse judgment resulting in a per curiam opinion being entered by the Second District Court of Appeal of Florida on March 9, 1988, affirming the summary judgment of the trial court (Jur. Stat., A-4).

The Appellants did not file a subsequent Motion for Rehearing under Florida Rule of Appellate Procedure 9.330, but chose to file a "MOTION FOR REHEARING EN BANC OR, IN THE ALTERNATIVE, FOR CERTIFICATION TO THE SUPREME COURT AS A QUESTION OF GREAT PUBLIC IMPORTANCE" (A 8-12). This Motion for Rehearing En Banc, etc., was denied by order of the Second District Court of Appeal of Florida dated April 27, 1988 (A 13). The Appellants also sought direct review to the Supreme Court of

Florida by filing a Notice of Appeal on May 25, 1988. However, this attempted appeal was summarily dismissed for lack of jurisdiction by order of the Florida Supreme Court dated May 27, 1988 (A 14).

On July 13, 1988, **over 120 days after the per curiam opinion of the Second District Court of Appeal of Florida was entered,** the Appellants filed their Notice of Appeal to this Court seeking direct review of the state district court opinion under 28 U.S.C. §1257(2) (Jur. Stat. 2).

On July 25, 1988, the Appellants' Jurisdictional Statement was received in the offices of the Attorney General of the State of Florida, counsel for the Appellees.

ARGUMENT

I

This appeal should be dismissed for lack of jurisdiction because the Notice of Appeal was not filed within 90 days after the per curiam opinion of the Second

District Court of Appeal of Florida was entered on March 9, 1988, as required by 28 U.S.C. §2101(c).

In their jurisdictional statement, the Appellants attempt to invoke the jurisdiction of this Court under 28 U.S.C. §1257(2). The Notice of Appeal cites both the per curiam opinion of the Second District Court of Appeal of Florida entered on March 9, 1988, and the court's order of April 27, 1988, denying their subsequent "Motion for Rehearing En Banc or, in the Alternative, for Certification to the Supreme Court of Florida as a Question of Great Public Importance", as being appealed. However, there is absolutely no precedent under federal or Florida law for an order denying a motion for rehearing en banc or other post-judgment motion being treated as a "final" judgment or decree for appellate review purposes. See, In Re Marachowsky Stores Co., 188 F.2d 686, 689 (7th Cir. 1951); Rule 9.020(g), Fla.R.App.P., Young Adults, Etc. v. B&B Cash Grocery Stores, Inc., 157 So.2d 809 (case 1) (Fla. 1963); and Finley v. Finley, 103 So.2d 191 (case 1) (Fla. 1958).

The Appellants also suggest that this appeal was timely filed within the 90-day period prescribed by 28 U.S.C. §2101(c) based on the fact that their "Motion For Rehearing En Banc, etc.", was denied by order of the Second District Court of Appeal of Florida on April 27, 1988 (Jur. Stat. 2). However, this contention has been expressly rejected by the Florida Supreme Court and the district courts of appeal of Florida.

This identical claim was reviewed by the Florida Supreme Court in the leading case of State v. Kilpatrick, 420 So.2d 868 (Fla. 1982). In the Kilpatrick case, the sole issue before the court was whether a Motion For Rehearing En Banc before a district court of appeal, which was filed separately [under Rule 9.331(c), Fla.R.App.P.], and not in conjunction with a Motion for Rehearing under Rule 9.330(a), Fla.R.App.P., had the effect of tolling the time for filing a petition for review in the Florida Supreme Court.

The Supreme Court of Florida clearly answered this question in the negative in its Kilpatrick opinion by succinctly

holding that ". . . the time for petitioning this Court was not tolled because the separately filed motion for en banc review was a non-allowable motion under Rule 9.331 and was in fact a nullity." Id., at 420 So.2d 868. The holding of the Florida Supreme Court in the Kilpatrick opinion that a separately filed appellate Rule 9.331 motion for rehearing en banc is a nullity under Florida law was subsequently followed by the First District Court of Appeal of Florida in its decision in La Grande v. B&L Services, Inc., 436 So.2d 337 (Fla. 1st DCA 1983).

A similar result also occurs under the comparable provisions of Fed.R.App.P. 35(c) which read in pertinent part that the ". . . pendency of such a suggestion [for a rehearing en banc] . . . shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate." See, also, U.S. v. Buljubasic, 828 F.2d 426 (7th Cir. 1987); and Stern, Gressman & Shapiro, Supreme Court Practice, 313 (6th ed. 1986).

The Appellants' belated alternative motion for "Certification to the Supreme

Court of Florida as a Question of Great Public Importance" was also totally unauthorized and a nullity under Florida law. A suggestion made by a party to an appeal that a matter should be certified to the Florida Supreme Court as a matter of great public importance must, under Rule 9.125, Fla.R.App.P., be filed soon after the notice of appeal to the district court of appeal is filed. Rule 9.125(c), Fla.R.App.P., mandates that any such motion or suggestion for certification to the Florida Supreme Court ". . . shall be filed within ten days from the filing of the notice of appeal". (e.s.) (A. 8)

It is thus evident that the Appellants' failure to file their Florida Appellate Rule 9.331(c) "Motion For Rehearing En Banc", etc., in conjunction with a Motion For Rehearing under Florida Appellate Rule 9.330(a) was fatal to this appeal.[1]/ Consequently, the conclusion is inevitable

[1]/ In accord, is Supreme Court Rule 11.3 specifying a timely filed **petition for rehearing** as the only post-judgment or decree pleading that will toll the time for filing a notice of appeal to this Court.

that Appellants' "Motion for Rehearing En Banc", etc., was a nullity and did not toll the time for filing a notice of appeal to this Court from the per curiam opinion of the Second District Court of Appeal of Florida entered on March 9, 1988.[2] Since the notice of appeal to this Court was filed on July 13, 1988, 126 days after entry of the challenged opinion of the state district court of appeal, this Court clearly lacks jurisdiction and the appeal should be dismissed.

[2] The Appellants' ill-fated attempt to appeal the district court of appeal per curiam opinion directly to the Florida Supreme Court resulted in the appeal being dismissed sua sponte by an order of the Florida Supreme Court filed on May 27, 1988 (A 14). The fact that one of the stated grounds for the summary dismissal of the appeal by the Florida Supreme Court was that ". . . the notice was not timely filed . . ." (A 14) compels the conclusion that the Florida Supreme Court also treated the Appellants' Motion for Rehearing En Banc, etc., as a nullity for purposes of computing the 30 day time period for filing a notice of appeal under Rule 9.110(b), Fla.R.App.P.

II

This appeal should be dismissed on the alternative ground that denial under Florida law of homestead exemption tax relief to real property used only as a temporary residence does not present a substantial federal question.

Even if this Court were to somehow determine that the appeal was timely filed and that jurisdiction existed, the Appellees submit that the Appeal should still be dismissed for lack of a substantial federal question. One of the conclusions set forth in the summary final judgment of the trial court was that:

> 3. Plaintiffs failed to cite to the court any statutes or case law of Florida holding that similar property owned by a permanent resident of Florida and occupied only periodically during the year as a seasonal or vacation dwelling would be entitled to the homestead tax exemption under Florida law. (Jur. Stat. A-7)

This conclusion of the trial court is eminently correct because the Appellants totally failed to demonstrate that the "permanent residence" requirement for homestead exemption tax relief under Florida

law discriminates, in any way, against non-residents. Furthermore, as clearly reflected on the face of the summary final judgment (Jur. Stat. A-6), the trial court's findings and rulings were based solely on the pleadings of record and legal argument of counsel for the respective parties. **Thus, absolutely no testimony or documentary evidence was presented to the trial court that the Collier County Property Appraiser had ever granted a homestead tax exemption to a second dwelling owned by a permanent resident of Florida and used only as a temporary residence.**

The constitutional provisions of Art. VII, s.6(a), Fla. Const., and the corresponding statutory provisions of Section 196.031(1), Fla. Stat. (1985), plainly limit homestead exemption tax relief to property upon which is maintained the "permanent residence" of the owner (or others naturally or legally dependent upon the owner). Notwithstanding these clear constitutional and statutory provisions to the contrary, the Appellants maintain their spurious contention that the subject temporary residence would have been entitled to

homestead exemption tax relief under Florida law if the property had been owned by a resident of this state who had a "permanent home" in another county and, like the Appellants here, used the property as a temporary residence.

However, it is abundantly clear under Florida law that a permanent resident of Florida is only allowed homestead exemption tax relief on one dwelling declared to be his or her "permanent residence", even if the Florida resident owns two or more dwellings also located in the state. See, Department of Revenue Rule 12D-7.007(5) F.A.C.; and 51 Fla.Jur.2d, Taxation, s. 20:133.

The pertinent provisions of Rule 12D-7.007(5), F.A.C., provide that the ". . . [Florida] Constitution contemplates that one person may claim only one homestead exemption without regard to the number of residences owned by him . . ." The treatise on Taxation as set forth at 51 Fla.Jur.2d, Taxation, s.20:133 is also in accord by stating in pertinent part that ". . . Only one exemption is allowed any individual or family unit or with respect to any

residential unit.. . . A person applying for a homestead exemption who resides in another county must present competent evidence that he is only claiming the homestead exemption in one county to be eligible for the exemption" (footnotes omitted). Id., at pages 871-872.

It is evident from Department of Revenue Rule 12D-7.007(5), F.A.C., and the cited section from 51 Fla.Jur.2d, Taxation §20:133, that **the subject real property would not be entitled to homestead exemption tax relief even if the property were owned by a permanent resident of Florida and (like the Appellants) used only as a temporary, seasonal residence.** Thus, the Appellants' suggestion to the contrary is utterly devoid of any legal or factual basis.

The weakness of the Appellants' legal position is illustrated by their misplaced reliance on the recent decision of the Florida Supreme Court in the consolidated cases of Public Health Trust of Dade County v. Lopez, and Mary Helen Hines, etc. v. Gessler Clinic, P.A., et al., 13 Fla. Law Weekly 377 (Fla. 1988). In the Public

Health Trust and Hines cases, the sole issue before the court was whether, under current Florida constitutional provisions, the two homesteads were exempt from claims of creditors where there were no minor children or adult dependent children. This question was answered in the affirmative by the Florida Supreme Court.

There were no federal constitutional claims under the Privileges and Immunities and Equal Protection Clauses presented in the Public Health Trust and Hines cases. Furthermore, neither of the decedent homeowners were nonresidents of Florida. In addition, it was undisputed in the Public Health Trust and Hines cases that the dwellings in question were being occupied as the permanent residences of the decedents at the time of their deaths.

The conclusion that a state law limiting homestead tax relief to property used as a "permanent residence" is totally nondiscriminatory with respect to nonresidents was also expressly approved by the Supreme court of New Jersey in the controlling case of Rubin v. Glaser, 416 A.2d 382 (N.J. 1980), appeal dismissed for want of a

substantial federal question at 449 U.S. 997, 101 S.Ct. 389, 66 L.Ed.2d 239 (1980).

In its opinion in the Rubin v. Glaser, supra, decision, the New Jersey Supreme Court succinctly observed that:

> Second, this statutory aim was not directed against nonresidents. Thus, New Jersey residents who do not own a principal residence in the State are on the same footing as nonresidents. For example, a New Jersey resident whose principal place of residence is a rented apartment would not receive a rebate on a home he owned at the New Jersey shore. Moreover no one is entitled to a rebate of taxes paid on a second home. Thus, plaintiffs are treated the same as New Jersey residents who own a second home for summer vacations in New Jersey with respect to rebates on that second home. (e.s.)

Id., at pages 386-367 (A. 11-12).

Like the New Jersey Homestead Rebate Act, the Florida homestead tax exemption provisions do not apply to a "temporary" residence which is not the permanent homestead of the owner, whether the temporary residence is owned by a resident of Florida or by a resident of another state. Consequently, the Appellants' constitutional claims should be summarily dismissed for

lack of a substantial federal question, since no discrimination whatsoever has been shown with respect to the application of Florida's homestead tax laws to dwellings used only as a temporary residence by either a resident or nonresident of this state.

Furthermore, constitutional claims identical to those presented by the Appellants here were also expressly rejected in Rubin v. Glaser, supra. In the Rubin case, the plaintiffs were residents of Pennsylvania who also owned a "second" house in New Jersey. Like the subject property, the New Jersey house was occupied by the Rubins in the summer and periodically during other times of the year as a vacation home. The Rubins were denied a homestead tax rebate with respect to real property taxes paid on their vacation home.

The Rubins then challenged the constitutionality of the New Jersey Homestead Rebate Act asserting, among other claims, that the act violated the Privileges and Immunities Clause and the Equal Protection Clause of the United States Constitution.

However, the Rubins' constitutional claims were expressly rejected by the New Jersey Supreme Court in its opinion in the Rubin case.

The subsequent appeal of the New Jersey Supreme Court Rubin decision to this Court was dismissed for want of a substantial question at 449 U.S. 997, 101 S.Ct. 389, 66 L.Ed.2d 239 (1980). Thus, the dismissal of the Rubin appeal for lack of a substantial federal question constitutes a ruling on the merits by this Court in the sense that the dismissal represents the view that the judgment appealed from was correct as to the federal questions raised and necessary to the decision. Washington v. Confederated Bands and Tribes, 439 U.S. 463, at 476 n.20, 99 S.Ct. 940, 58 L.Ed.2d 740 (1979); and Hicks v. Miranda, 422 U.S. 332, 343-345, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975).

It is significant that the provisions of the New Jersey Homestead Rebate Act construed in the Rubin decision are quite similar to the provisions of the Florida constitutional and statutory Homestead Exemption Provisions with respect to the "permanent residence" requirement. The New

Jersey Homestead Rebate Act reads in pertinent part as follows:

> Every citizen and resident of this State shall be entitled, annually, to a homestead rebate on a dwelling house and the land upon which such dwelling house is situated, or on a dwelling house assessed as real estate situated on land owned by another or others **which constitutes the place of his domicile and which is owned and used by him as his principal residence.** N.J.S.A. 54:4-3:80(a); (emphasis added)

The New Jersey Supreme Court rejected the Privileges and Immunities claim by observing in the Rubin opinion as follows:

> A principle which may be derived from these decisions is that state taxing statutes, conferring a benefit or advantage only on residents, do not run afoul of the Privileges and Immunities Clause, provided they bear a "close" or "substantial relationship" to a legitimate purpose independent of discrimination against nonresidents. Hicklin v. Orbeck, 437 U.S. at 525, 527, 98 S.Ct. at 2488, 2489, 57 L.Ed.2d at 404, 405; Toomer v. Witsell, 334 U.S. at 396, 68 S.Ct. at 1162, 92 L.Ed. at 1471. The Homestead Rebate Act satisfies the requirements of the Privileges and Immunities Clause, bearing a close relationship to a proper purpose irrespective of the impact upon nonresidents.

> . . . we emphasize that the Act's application solely to principal places of residence is closely related to the beneficent purpose of alleviating the heavy realty tax burden. As Judge Morgan wrote for the Appellate Division, the rebate was meant to assist "the taxpayer in times of escalating property taxes to keep a roof over his head." 166 N.J. Super. at 265, 399 A.2d at 988. The Legislature did not intend to foster ownership of property for a second home to be used for vacations or for purposes other than maintaining a principal residence. (e.s.)

Id., at page 385

In the Rubin opinion, the New Jersey Supreme Court also rejected the plaintiffs' Equal Protection claim by stating in pertinent part on pages 387-388 of the opinion that:

> Plaintiffs' contention with respect to the Equal Protection Clause is equally without merit. There has been no meaningful restriction on their fundamental right to travel and so the burden does not rest upon the State to establish a compelling state interest to justify the law. The Homestead Rebate Act does not penalize the exercise of the right to travel. That right is penalized when nonresidents are denied "a basic necessity of life" or a "fundamental" right . . .. (Citations omitted.) Denial of homestead rebate on a vacation home does not rise to the level of a deprivation

of "a basic necessity of life" or of a "fundamental" right. Furthermore, the homestead rebate is not denied to those persons, and only those persons, who have exercised their constitutional right of interstate migration. See Dunn v. Blumstein, 405 U.S. at 338, 92 S.Ct. at 1001, 31 L.Ed.2d at 281-282. Moreover, the Act contains no residential durational element of the type which has been invalid where the individual has been required to have resided within the state for a minimum period of time. The Supreme Court has expressly noted that in the absence of a durational residency issue, it did "not intend to 'cast doubt on the validity of appropriately defined and uniformly applied bona fide residence.'" Memorial Hosp. v. Maricopa Cty., 415 U.S. at 255, 94 S.Ct. at 1081, 39 L.Ed.2d at 313, quoting Dunn v. Blumstein, 405 U.S. at 342 n.13, 92 S.Ct. at 1003 n.13, 31 L.Ed.2d at 284 n.13. This being so, the statute need not be measured by the strict scrutiny standards. . . . We agree fully with Judge Morgan, writing for the Appellate Division below, that:

> The classification here evidences the Legislature's attempt to blunt escalating property taxes that threaten a family's ability to continue living in their home. We have no doubt that lessening tax burdens for that essential reason, and denying relief to less essential types of residential property ownership, is well within the Legislature's discretion. (e.s.)

The Appellants' vain attempt to distinguish the obviously adverse holding of the Rubin decision is far less than convincing. The fact that the New Jersey Homestead Rebate Act was passed in conjunction with the New Jersey Gross Income Tax Act had absolutely nothing to do with the rationale or the holding of the Court in the Rubin opinion. Indeed, the brief reference to the New Jersey Gross Income Tax Act was expressly noted "In passing . . ." in one paragraph in the detailed five-page Rubin opinion and was never mentioned again! Id., at 416 F.2d 387.

The Appellants cite various cases in their Jurisdictional Statement purporting to support their position that the Florida constitutional and statutory provisions limiting homestead tax relief to real property used as a "permanent residence" by the owner (or dependents) violate the Privileges and Immunities and Equal Protection Clauses of the United States Constitution. However, not one of the cases cited by the Appellants holds that a state law denying homestead tax relief to

dwellings used only as temporary residences is constitutionally impermissible.

Substantially all of the cases cited in the Appellants' Jurisdictional Statement deal with such obvious "fundamental" activities as a right of a nonresident to earn a livelihood or the right of a foreign corporation to transact business in another state. Typical of the "right to earn a livelihood" cases is the recent decision of this Court in Supreme Court of Virginia v. Friedman, 108 S.Ct. 2260 (1988). Another line of cases cited by the Appellants deals with claims by foreign corporations of discriminatory taxation with respect to business activities transacted in the nondomiciliary state. See, e.g., Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 105 S.Ct. 1676, 84 L.Ed.2d 751 (1985).

The Appellees submit that none of these "right to transact business" or "right to earn a livelihood" cases relied upon by the Appellants are applicable to or controlling upon the disposition of this appeal. There was never any contention presented by the Appellants to the state courts that the subject temporary residence was used by the

Appellants as a place for the transaction of business or of earning a livelihood in the State of Florida.[3]/

A third category of decisions set forth in the Appellants' Jurisdictional Statement is typified by the "right to travel" decision of this Court in Williams v. Vermont, 472 U.S. 14, 105 S.Ct. 2465, 86 L.Ed.2d 11 (1985). However, as expressly acknowledged by the New Jersey Supreme Court in Rubin v. Glaser, supra, homestead tax relief **does not penalize the right to travel!** Id., at page 387.

The Rubin opinion also quotes from one of the leading decisions of this Court in recent years dealing with the Privileges and Immunities Clause of the U.S. Constitution, i.e., Baldwin v. Fish & Game Commission of Montana, 436 U.S. 371, 98 S.Ct.

[3]/ The Appellant, Peter Herzog, is a lawyer and member of both the Missouri Bar and the Florida Bar. However, Mr. Herzog never asserted in any pleading or legal argument in the state courts that his temporary residence located in Collier County, Florida, was also used as a professional office from which he practiced law in Florida.

1852, 56 L.Ed.2d 354 (1978). In the Baldwin case, this Court upheld the constitutionality of a Montana hunting license provision which imposed substantially higher license fees on nonresidents. The Montana Supreme Court concluded in the Baldwin opinion as follows:

> Appellants' interest in sharing this limited resource on more equal terms with Montana residents of the Privileges and Immunities Clause. Equality in access to Montana elk is not basic to the maintenance or well-being of the Union. appellants do not -- and cannot -- contend that they are deprived of a means of a livelihood by the system or of access to any part of the State to which they may seek to travel. . . . (e.s.)

The validity of the conclusion that the ownership by a nonresident of a temporary residence in another state is a luxury rather than a "basic necessity of life" would appear to be beyond serious question. Certainly, the occupancy of a seasonal residence on the Gulf Coast of Florida by Missouri residents cannot be reasonably characterized as being a "fundamental" activity comparable in nature to the basic

right of interstate travel or right to earn a livelihood in a non-domiciliary state.

Since the occupancy by a nonresident of a dwelling as a temporary residence is not 'basic to the very livelihood of the Nation', the homestead tax exemption must be sustained if the Florida Legislature could have reasonably concluded that the challenged classification would promote a legitimate state purpose. Exxon Corp. v. Eagerton, 462 U.S. 176, 196, 103 S.Ct. 2296, 76 L.Ed.2d 497 (1981).

There is an obvious legitimate state purpose in imposing a "permanent residence" requirement as a condition precedent to granting homestead tax exemption relief. The basic $5,000 homestead tax exemption was adopted in the year 1934 during the Depression era as former Art. X, Sec. 7, Fla.Const. (1885). Most of the substance of that section was carried over into the 1968 Revision of the Florida Constitution, to form the current Art. VII, Sec. 6. In 1980, the constitutional provisions of Art. VII, Sec. 6 were amended to authorize an increase to $25,000 of the homestead exemption.

When the homestead exemption provisions of former Art. X, Sec. 7 and current Art. VII, s. 6, Fla.Const., are viewed in historical perspective, the clear intent of these provisions to afford the basic "homestead" necessary for maintaining shelter for the family unit some economic protection from the full impact of tax liability is apparent.[4]/

Since the Appellants admittedly have their permanent home in the State of Missouri, it seems evident that their "temporary residence" in Collier County, Florida, does not fall within the classification of a "basic homestead" which is the object of the tax exemption relief under the challenged constitutional and statutory provisions. Consequently, the "permanent residence" requirement under attack here as a condition precedent to entitlement to homestead exemption tax relief in Florida does

[4]/ The court in Rubin recognized that the comparable homestead rebate in New Jersey had the beneficent purpose of assisting "the taxpayer in times of escalating property taxes to keep a roof over his head". Id., 416 A.2d 386.

have a reasonable relationship to a legitimate state purpose and does not violate any federal constitutional standards.

CONCLUSION

The Appellees respectfully submit that this appeal should be dismissed for lack of jurisdiction because the notice of appeal was untimely; and/or want of a substantial federal question or, in the alternative, that the opinion of the District Court of Appeal of Florida, Second District, should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

STATUTORY AND RULE PROVISIONS INVOLVED

28 U.S.C. §2101. Supreme Court; time for appeal or certiorari; docketing; stay

* * * * *

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

* * * * *

Rule 35. Fed.R.App.P. Determination of Causes by the Court in Banc

* * * * *

(c) Time for Suggestion of a Party for Hearing or Rehearing in Banc; Suggestion Does Not Stay Mandate. If a party desires to suggest that an appeal be heard initially in

banc, the suggestion must be made by the date on which the appellee's brief is filed. A suggestion for a rehearing in banc must be made within the time prescribed by Rule 40 for filing a petition for rehearing, whether the suggestion is made in such petition or otherwise. The pendency of such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate.

Supreme Court Rule 11. Appeal, cross-appeal -- time for taking

* * * * *

.3. The time for filing the notice of appeal runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed by any party in the

case, the time for filing the notice of appeal for all parties (whether or not they requested rehearing or joined in the petition for rehearing, or whether or not the petition for rehearing relates to an issue the other parties would raise) runs from the date of the denial of rehearing or the entry of a subsequent judgment.

* * * * *

Rule 9.125, Fla.R.App.P. Review of Trial Court Orders and Judgments Certified by the District Courts of Appeal Requiring Immediate Resolution by the Supreme Court

* * * * *

(c) Suggestion. Any party may file with the district court and serve on the parties a suggestion that the order to be reviewed should be certified by the district court to the Supreme Court. The suggestion shall be substantially in the form prescribed by this rule and shall be filed within ten days from the filing of the notice of appeal.

* * * * *

Rule 9.330, Fla.R.App.P. Rehearing; Clarification

(a) Time for Filing; Contents; Reply. A motion for rehearing or for clarification of decision may be filed within 15 days of an order or within such other time set by the court. The motion shall state with particularity the points of law or fact which the court has overlooked or misapprehended. The motion shall not re-argue the merits of the court's order. A reply may be served within 10 days of service of the motion.

(b) Limitation A party shall not file more than one such motion with respect to a particular decision.

* * * * *

Rule 9.331, Fla.R.App.P. Determination of Causes in a District Court of Appeal En Banc

* * * * *

(c) Rehearings En Banc.

(1) Generally. A rehearing en banc may be ordered by a district court of appeal on its own motion or on motion of a party.

Within the time prescribed by Rule 9.330 and in conjunction with the motion for rehearing, a party may move for an en banc rehearing solely on the grounds that the case is of exceptional importance or that such consideration is necessary to maintain uniformity in the court's decisions. A motion based on any other ground shall be stricken. A vote will not be taken on the motion unless requested by a judge on the panel that heard the proceeding, or by any judge in regular active service on the court. Judges who did not sit on the panel are under no obligation to consider the motion unless a vote is requested.

* * * * *

Rule 12D-7.007, Fla.Adm.Code. Homestead Exemptions -- Residence Requirement

* * * * *

(5) The Constitution contemplates that one person may claim only one homestead exemption without regard to the number of

residences owned by him and occupied by "another or others naturally dependent upon" such owner. This being true no person residing in another county should be granted homestead exemption unless and until he presents competent evidence that he only claims homestead exemption from taxation in the county of the application.

51 Fla.Jur., Taxation, §20:133. Multiple residences get only one exemption

Only one exemption is allowed any individual or family unit, or with respect to any residential unit. Thus, one person may claim only one homestead exemption without regard to the number of residences owned by him and occupied by another or others naturally dependent upon the owner. A person applying for a homestead exemption who resides in another county must present competent evidence that he is only claiming the homestead

exemption in one county to be eligible for the exemption. (Citations omitted.)

Rule 9.020, Fla.R.App.P. Definition

* * * * *

(g) Rendition (of an order): the filing of a signed, written order with the clerk of the lower tribunal. Where there has been filed in the lower tribunal an authorized and timely motion for new trial or rehearing, to alter or amend, for judgment in accordance with prior motion for directed verdict, notwithstanding verdict, in arrest of judgment, or a challenge to the verdict, the order shall not be deemed rendered until disposition thereof.

* * * * *

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

PETER W. HERZOG AND
JOAN L. HERZOG,

Appellants, Case No. 87-1056

v.

SAM L. COLDING, as Collier
County Property Appraiser,
and DEPARTMENT OF REVENUE
OF THE STATE OF FLORIDA,

Appellees.

MOTION FOR REHEARING EN BANC OR,
IN THE ALTERNATIVE, FOR CERTIFICATION
TO THE SUPREME COURT AS A
QUESTION OF GREAT PUBLIC IMPORTANCE

COMES NOW Appellants and move this Court for its Order granting a rehearing En Banc and in so moving, Appellants state that an En Banc decision in this case is necessary because the Opinion by the Division, copy of which is attached, does not address the significant Constitutional issues raised by Appellants in their appeal from the order of the Circuit Court and more particularly described as follows:

1. Florida Statute Section 196.031(3) and Article VII, Section 6 granting a homestead allowance in the amount of $25,000.00 to all residents of the State of Florida

and denying same to all non-residents because of their non-residency is violative of Article IV, Section 2 of the United States Constitution;

2. Florida Statute Section 196.031(3) and Article VII, Section 6 is violative of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, and

3. Florida Statute Section 196.031(3) and Article VII, Section 6 is violative of Article I, Section 2 of the Florida Constitution.

Appellants further state that without opinion of this Court it will be more difficult for the Supreme Court of Florida, to which Apellants intend to move for review should this Court not grant relief, to understand the reasoning and considered opinion of this Court. As a further reason for granting the relief asked for in this Motion, Appellants state that should this Court not grant a rehearing and should the Supreme Court of Florida not grant a review of this case, the important Constitutional issues involved in this case will be ad-

dressed, for the first time, in the Supreme Court of the United States without the opinion of the Florida Courts as to the propriety of their Statutes, which may, at the very least, conflict with the Constitution of the State of Florida.

Appellants further move that this Court certify this case and the issues presented therein to the Supreme Court of Florida for the same reasons as stated above and for the reason that the issues contained within the case are of great public importance.

COMES NOW Peter W. Herzog, Jr., who being first duly sworn upon his oath deposes and states that he is one of the Appellants herein and counsel for both Appellants, and that the motions herein made by Appellants are made after a review by him of the facts and circumstances of the case and the applicable law therein. Affiant further states that the issues sought to be certified to the Supreme Court of Florida are issues which he believes, based on a reasoned and studied professional judgment, require immediate resolution by the Supreme Court of Florida and are of great public importance, and Affiant

further states that he has a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance.

/s/
Peter W. Herzog

Subscribed and sworn to before me this 22nd day of March, 1988.

/s/
Notary Public

My Commission Expires: My Commission Expires Sept. 11, 1989

Respectfully submitted,

CARUTHERS, HERZOG, CREBS & MCGHEE

By: /s/
Peter W. Herzog - #307661
555 Washington Avenue
6th Floor
St. Louis, MO 63101
(314) 231-6700

OF COUNSEL:

Leo J. Salvatori
Quarles & Brady
The Four Hundred Building
400 Fifth Avenue South, Suite 301
Naples, Florida 33940-6597
(313) 262-5959

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Rehearing En Banc or, in the Alternative, for Certification to the Supreme Court as a Question of Great Public Importance, has been furnished by mail to J. Terrell Williams, Assistant Attorney General, Department of Legal Affairs, Tax Section, Capitol Building, Tallahassee, Florida 32399-1050; and to Leo J. Salvatori, Esq., The Four Hundred Building, 400 Fifth Avenue South, Suite 301, Naples, Florida 33940; and to James Siesky, Esq., 791 Tenth Street South, Naples, Florida 33940, on this 22nd day of Marcy, 1988.

/s/

IN THE SECOND DISTRICT COURT OF APPEAL,
LAKELAND, FLORIDA

APRIL 27, 1988

PETER W. HERZOG AND
JOAN L. HERZOG,

Appellants, Case No. 87-1056

v.

SAM L. COLDING, as Collier
County Property Appraiser,
and DEPARTMENT OF REVENUE
OF THE STATE OF FLORIDA,

Appellees.

Appellants having filed a motion for rehearing en banc or, in the alternative for certification to the Supreme Court as a question of great public importance in the above-styled case, upon consideration, it is

ORDERED that said motion is hereby denied.

A TRUE COPY
ATTEST:
/s/
WILLIAM A. HADDAD, CLERK
SECOND DISTRICT COURT OF APPEAL

cc: Peter W. Herzog
J. Terrell Williams
Leo J. Salvatori, Esq.
James Siesky, Esq.

SUPREME COURT OF FLORIDA
FRIDAY, MAY 27, 1988

PETER W. HERZOG AND
JOAN L. HERZOG,

Appellants,

v.

SAM L. COLDING, as Collier County Property Appraiser, and DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA,

Appellees

Case No. 72,485

District Court of Appeal 2d District - No. 87-1056

It appearing to the Court that the notice was not timely filed and further that the District Court of Appeal, Second District, did not declare invalid a State Statute or a provision of the State Constitution, and that, therefore, it is without jurisdiction, this appeal is hereby dismissed subject to reinstatement if timeliness and jurisdiction are established on proper motion filed within fifteen (15) days from the date of this order. See Article V, Section 3(b)(1), Florida Constitution.

TC
cc: Hon. William A. Haddad, Clerk
Hon. William C. McIver, Judge
Hon. James C. Giles, Clerk

Peter W. Herzog, Esquire
Leo J. Salvatori, Esquire
James H. Siesky, Esquire
J. Terrell Williams, Esquire